IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 260 of 2004

Judgment reserved on 3.7.2007

Date of decision: 17.7.2007

Ashwani Kumar **…Appellant.**

Versus

State of H.P. **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?

For the appellant	**:**	**Mr. Virbahadur Verma, vice Mr. Sandeep Kaushik, Advocate.**
For respondent	**:**	**Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.**

Surjit Singh, Judge

Present appeal is directed against the judgment of trial Court whereby the appellant has been convicted of an offence under Section 20 (C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 and sentenced to undergo rigorous imprisonment for ten years and to pay fine of rupees one lakh; in default of payment of fine to undergo simple imprisonment for a further period of six months.

2. Prosecution case, as per record, is like this. On 6.11.2002 around 10.40 a.m. when PW-4 Lal Chand, HC was present in Pandoh

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Whether reporters of the local papers may be allowed to see the judgment?

Bazar on the National Highway, a van bearing registration No. HP-01-0065 came from Kullu side. It was being driven by the appellant. There was no other person present in the car. PW-4 Lal Chand signalled for stopping the car. It was not stopped. Instead, the speed was accelerated. HC Lal Chand (PW-4) then informed the S.H.O. Police Station, Sadar Mandi about the above said incident telephonically. The information was entered in the Rojnamcha vide entry, copy Ext. PW-9/A. A copy of it was sent to the Superintendent of Police, Mandi, in compliance with the provisions of sub-section (1) of Section 42 of the Narcotic Drugs & Psychotropic Substances Act. S.H.O. Shri K.D. Sharma (PW-13), accompanied by S.H.O. Shri Mangat Ram (PW-14) and some other police officials, proceeded towards Pandoh. He laid Nakka at a place called 'Bindravani' near Mandi town. Soon Maruti van bearing registration No. HP-01-0065 reached there. It was got stopped at the Nakka. Tek Singh, Up-Pardhan (PW-2) and Shyam Singh, Forest Guard at Bindravani Forest Check Post (PW-1) were associated as independent local witnesses. In the meanwhile, PW-4 Lal Chand, HC of Police Post Pandoh, also reached the spot chasing the van. Only the appellant was present in the van in driver's seat. The van was checked. Nine packets of 'Charas', concealed in the rear bumper were recovered. Total weight of the stuff was found to be 2 Kg. 250 grams. Two samples, each weighing 25 grams were separated from the recovered stuff. The sample packets and the bulk 'Charas' were made up into separate parcels and the parcels were sealed with a seal that produced the impression of English letter 'A'. Search and seizure memo was prepared. Written report of the search and seizure was also prepared and sent to the Police Station for formal registration of the case. The case property was deposited with MHC PW-6 Baldev Singh on 6.11.2002 itself who sent one of the two samples to the

Chemical Examiner through Constable Mohan Lal (PW-7). The chemical Examiner reported that the stuff contained resin to the extent of 31.25%.

3. Trial Court charged the appellant with offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act and on his pleading not guilty, put him on trial and ultimately convicted and sentenced him, as aforesaid.

4. Learned counsel representing the appellant submitted that neither of the two alleged independent witnesses supported the prosecution version and that the version narrated by the police officials, including SHO Shri K.D. Sharma (PW-13), was contradictory and did not inspire confidence. He also submitted that there was delay in the dispatch of the sample to the laboratory, which had not been explained. A further contention raised by him was that though the scene was got photographed, as per testimony of the police officials, but neither the independent witnesses nor the accused were there in those photographs, which suggested that no independent witness had been associated nor was the appellant there on the spot, when the alleged recovery was effected. His further submission was that even the number of the van does not appear in the photographs, which suggested the possibility of the 'Charas' having been recovered from some other van cannot be ruled out. Link evidence was also alleged to be missing. Further it was submitted that there was no evidence indicating as to who was the owner of the van.

5. We have considered the aforesaid submissions in the light of the evidence on record.

6. It is true that both the independent witnesses, associated by the police during the search and seizure, namely PW-1 Shyam Singh, forest Guard and PW-2 Tek Singh, have not corroborated the prosecution version, but both of them stand contradicted by their previous statements, under Section 161 of the Code of Criminal Procedure, with which they

were duly confronted. PW-1 stated that he was approached to become a witness at 2.30 p.m., when the police officials were having sealed packets in a bag, but he refused to become the witness. At the same time he stated that his signatures were obtained on three or four papers without informing him about the contents of those papers. When the witness, according to his own testimony, had refused to become a witness, why should have he signed three – four papers on the asking of the appellants. These papers include the search and seizure memo Ext. PW-1/C. The witness admitted that the signature marked 'A', encircled in red on this memo, had been written by him. Similarly, PW-2 Tek Singh, though denied having witnessed the search, admitted his signature on the search and seizure memo, which fact suggests that he is not a truthful witness.

7. We do not find any major contradictions in the testimony of the police officials, examined as witnesses in the case. PW-4 HC Lal Chand, in-charge of Police Post Pandoh, testified that he tried to stop the van in Pandoh Bazar, when it came from Kullu side, but the driver not only did not stop it, he accelerated its speed and, therefore, he informed the S.H.O. Police Station Sadar Mandi telephonically and requested him to intercept the vehicle. This part of the testimony of the witness was not subjected to cross-examination and, therefore, there should be no reason to disbelieve the same. From this part of the testimony of PW-4 Lal Chand, it can legitimately be deduced that the appellant had a guilty conscious in the sense that he was knowing that 'Charas' was concealed in the bumper of the van. Had it not been so, he should have stopped the vehicle in Pandoh Bazar, when signalled by HC Lal Chand (PW-4) and got it checked.

8. PW-4 Lal Chand, PW-13 K.D. Sharma, Inspector/ SHO, Police Sadar Mandi and PW-14 Mangat Ram, Additional SHO, Police Station Sadar, Mandi have testified with one voice that the Nakka was

organized at Barindavani Forest Check Post at 11.00 a.m. on 6.11.2002 and soon a Maruti van No. HP-01-0065 reached there and on checking nine packets containing 'Charas' were recovered, which had been concealed in the rear bumper of the vehicle.

9. Contradiction which was pointed out by the learned counsel for the appellant is insignificant. Contradiction pointed by him is with respect to the names of the police officials, who returned to the Police Station and the time of their return after search and seizure was completed. PW-9 Lachhman Dass in his cross-examination stated that as per entry No. 18 in the Rojnamcha, SI Mangat Ram and SHO K.D. Sharma returned to the Police Station at 2.50 p.m. Though PW-13 Inspector K.D. Sharma stated that he returned to the Police Station at 2.40 p.m., PW-14 Mangat Ram stated that he remained on the spot till about 5.00 p.m. when the appellant was arrested. He further stated that the appellant was arrested at 4.00 p.m. No doubt this contradiction is there, but it was not pointed out how does this contradiction affect the prosecution version, particularly when as noticed herein-above, there is unchallenged testimony of PW-4 Lal Chand about the conduct of the appellant which is suggestive of his guilty mind.

10. Non-appearance of the witnesses or the accused in the photographs Exts. PW-13/A-1, PW-13/A-2 and PW-13/A-3 does not suggest that the appellant was not there or the witnesses were not there. In fact as is clear from the photographs, the same were taken with the objective of showing the recovery of packets, containing 'Charas' from the bumper of the van, in question. It has come in evidence that the bumper of the van was unscrewed. Number plate was fitted below the bumper, per photograph Ext. PW-13/A-2. The number plate is not visible in the other two photographs. The reason appears to be that when the bumper was unscrewed, the number plate had been removed.

11. Submission that there was no evidence on record as to who was the owner of the van, in question, and the possibility that the owner might have concealed the ‘Charas’ in the bumper without knowledge of the appellant cannot be ruled out, is also without merit. It is not the case of the appellant that he was unaware that ‘Charas’ had been concealed in the bumper. His plea is of total denial. He even denies that he was there in the van and driving it. Hence the submission is of no consequence. In any case, as already noticed, the testimony of PW-4 Lal Chand, HC about the conduct of the appellant in not stopping the vehicle but accelerating its speed, when signalled to stop, indicates that he (the appellant) knew that ‘Charas’ was concealed in the rear bumper of the van.

12. Coming to the submission regarding delay in dispatch of the sample to the Chemical Examiner, no doubt, the sample was deposited with the MHC on 6.11.2002 and it was dispatched to the Chemical Laboratory on 11.11.2002, but the delay in this case in sending the sample to the Laboratory has apparently caused no prejudice to the appellant. The appellant, therefore, cannot gain anything from this submission.

13. PW-13 K.D. Sharma, Inspector / S.BH.O. categorically stated that he returned from the spot along-with the case property after handing over further investigation to SI Mangat Ram and kept the case property in safe custody in the ‘Malkhana’ of the Police Station. Pw-6 Baldev Singh. In-charge Malkhana, stated that the case property was deposited with him along-with two sample parcels by PW-13 K.D. Sharma, S.H.O. and that one of the two sample parcels was sent by him to the Chemical Examiner on 11.11.2002 through HHC Mohan Lal (PW-7). Mohan Lal, PW-7 has stated that one sample parcel was entrusted to him along-with certain documents and RC No. 167/21 on 11.11.2002 by PW-6 Baldev Singh, HHC for being delivered at the Chemical Laboratory,

Kandaghat and that he deposited the same with the concerned official. No doubt the witness did not say that the sample was sealed with seal 'A', but that omission should not make any difference when there is unchallenged testimony of PW-6 Baldev Singh that the sample, which he handed over to PW-7 HHC Mohan Lal was sealed with seal 'A'. The report of the Chemical Examiner and the specimen impression of the seal affixed on the NCB form Ext. PW-14/E also prove that the sample, which was delivered by PW-7 Mohan Lal at the laboratory on 11.11.2002, was sealed and the seal impression read like letter 'A' of English alphabet. Under these circumstances, the contention that there is no link evidence can also not be upheld.

14. Lastly it was submitted that appellant was sent up for trial for possessing *Charas* and the *Charas*, as per definition contained in sub-clause (a) of Clause (iii) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, means resin, in whatever form, whether crude or purified, obtained from cannabis plant and also includes concentrated preparation known as Hashish oil or liquid Hashish. It has been submitted that in the present case, as per report of the Chemical Examiner, the entire sample stuff was not resin or say *Charas*, but only a part of it, to the extent of 31.25 per cent was resin and, hence, the appellant cannot be said to be in possession of 2 Kgs. 250 grams of 'Charas'. He says that what was in possession of the appellant was not whole '*Charas'* but something which included *Charas* (resin) to the extent of 31.25 per cent only and the rest of the stuff was some unknown substance about which report of the Chemical Examiner is silent. He has taken

us through the report of the Chemical Examiner, per which the sample contained contents of '*Charas'.*

15. We find ourselves in agreement with the aforesaid submission of the learned counsel for the appellant. His submission is supported by the judgment, delivered by a Division Bench of this Court, in *Dharam Pal versus State of Himachal Pradesh and another appeal (Criminal Appeal No.491 & 510 of 2003),* decided on 15.5.2007. In the aforesaid case, it has been held that only the resin content of the stuff is *Charas* and that in the absence of the report of the Chemical Examiner about the rest of the contents of the stuff, the quantity of the *Charas*, based on the percentage of the resin found therein by the Chemical Examiner, is required to be worked out and the appellant-accused is to be held responsible for possessing *Charas* only to the extent, the stuff contained the resin content in it.

16. As noticed hereinabove, the total quantity of stuff recovered from the appellant was 2 Kgs. 250 grams. The Chemical Examiner has found resin content in it to the extent of 31.25 per cent. That means the *Charas* / resin content in the recovered stuff was 703.125 grams. This quantity is less than the commercial quantity, as specified vide Notification No.S.O. 1055(E), dated 19th October, 2001, issued by the Central Government, even though more than the upper limit of the small quantity fixed by the same Notification. The offence is thus covered under Section 20(B) of the Narcotic Drugs and Psychotropic Substances Act, which is punishable with imprisonment that may extend to ten years and with fine which may extend to Rs.1,00,000/-. Looking to the quantity of resin / Charas found in the stuff recovered from the appellant, we feel that the ends of justice would be met in case his sentence is reduced from ten years rigorous imprisonment and a fine of Rs.1,00,000/- to five years

rigorous imprisonment and a fine of Rs.40,000/-; in default of payment of fine simple imprisonment for a further period of six months. It is ordered accordingly.

17. Appeal stands disposed of.

(Surjit Singh)
Judge

July 17, 2007 (BC)

(Kuldip Singh)
Judge